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No. 00-1471

In The

Supreme Court of the United States

KENTUCKY ASSOCIATION OF HEALTH PLANS, INC., et al.,

Petitioners,

v.

JANIE MILLER, COMMISSIONER OF THE KENTUCKY DEPARTMENT OF INSURANCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Sixth Circuit Court of Appeals held that Kentucky's Any Willing Provider ("AWP") statutes, Ky. Rev. Stat. Ann. § 304.17A-270 and Ky. Rev. Stat. Ann § 304.17A-171(2), "regulate insurance" and, therefore, are saved from preemption by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

Respondent disagrees with the question presented to this Court by Petitioners. Therefore, Respondent offers the following question for this Court's consideration.

The Question Presented is:

Whether Kentucky's Any Willing Provider statutes, Ky. Rev. Stat. Ann. § 304.17A-270 and Ky. Rev. Stat. Ann. § 304.17A-171(2), are statutes that "regulate insurance" and, therefore, are saved from ERISA preemption?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. The Federal Circuits Are Not In Conflict Over The Issues Presently Before This Court 5

A. There is No Split In The Circuits Over The Question Of Whether AWP Statutes Are Laws Which Regulate Insurance 6

i. The Eighth Circuit 6

ii. The Fifth Circuit 7

B. The Circuits Are Not Divided Over The Substantive Content of the McCarran-Ferguson Risk-Spreading Factor 10

II. The Sixth Circuit Properly Followed All Applicable Precedents Of This Court 13

III. Petitioners' Attempt To Treat All State AWP Statutes The Same Must Fail 16

TABLE OF AUTHORITIES

Pag

CASES

American Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc., 973 F. Supp. 60 (D. Mass. 1997) .....

Blue Cross & Blue Shield v. Bell, 798 F.2d 1331 (10th Cir. 1986) .....

California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 519 U.S. 316 (1997) ....

Cigna Healthplan of Louisiana, Inc. v. Louisiana, 82 F.3d 642 (5th Cir. 1996), *cert. denied*, 519 U.S. 964 (1996) 7, 9,

Cisneros v. UNUM Life Ins. Co., 134 F.3d 939 (9th Cir. 1998), *cert. denied*, 526 U.S. 1086 (1999) 10,

DeBuono v. N.Y.S.A. – ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997) .....

Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979) 9, 13, 14, 15,

Kentucky Ass'n of Health Plans, Inc. v. Nichols, 227 F.3d 352 (6th Cir. 2000). .....

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 3, 4,

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) .....

Prudential Ins. Co. of America v. National Park Med. Ctr., Inc., 154 F.3d 812 (8th Cir. 1998) 6, 10,

Smith v. Jefferson Pilot Life Ins. Co., 14 F.3d 562 (11th Cir. 1994), *cert. denied*, 513 U.S. 808 (1994) 10, 11,

TABLE OF AUTHORITIES – Continued

Page

Stuart Circle Hosp. Corp. v. Aetna Health Management, 995 F.2d 500 (4th Cir. 1993), *cert. denied*, 510 U.S. 1003 (1993) 15

Texas Pharmacy Ass'n v. Prudential Ins. Co. of America, 105 F.3d 1035 (5th Cir. 1997), *cert. denied*, 522 U.S. 820 (1997) 7, 8, 15

United States Dep't of the Treasury v. Fabe, 508 U.S. 491 (1993) 13

UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358 (1999) 4, 16

Washington Physicians Serv. Ass'n v. Gregoire, 147 F.3d 1039 (9th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999) 7

STATUTES AND REGULATIONS

15 U.S.C. § 1012(b) 4, 6

29 U.S.C. § 1144(b)(2)(A) 1

Ark. Code Ann. § 23-99-204(a)(3) 6

Ky. Rev. Stat. Ann. § 304.17A-110 (Banks-Baldwin 1995) 1, 2

Ky. Rev. Stat. Ann. § 304.17A-110(3) (Banks-Baldwin 1995) 1

Ky. Rev. Stat. Ann. § 304.17A-005(18) 3

Ky. Rev. Stat. Ann. § 304.17A-005(23) 2

Ky. Rev. Stat. Ann. § 304.17A-171(2) 1, 3

Ky. Rev. Stat. Ann. § 304.17A-270 ..... 1, 2

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals, affirming the United States District Court for the Eastern District of Kentucky, ruled that Kentucky's Any Willing Provider ("AWP") statutes, Ky. Rev. Stat. Ann. § 304.17A-270 (formerly § 304.17A-110(3)) and Ky. Rev. Stat. Ann. § 304.17A-171(2), are not preempted by ERISA. While both courts found that Kentucky's AWP statutes do "relate to" and are "connected with" ERISA plans, the courts further found that Kentucky's AWP statutes fall within the savings clause, see 29 U.S.C. § 1144 (b)(2)(A), as being state laws that regulate insurance.[1] Petitioners' Appendix 1a-63a and 64a-84a.

In 1994, in an effort to reform Kentucky's healthcare market, the Kentucky General Assembly passed House Bill ("HB") 250. Kentucky's first general AWP statute was included in that bill and later codified in Ky. Rev. Stat. Ann. § 304.17A-110(3). Ky. Rev. Stat. Ann. § 304.17A-110 included other important patient protection regulatory provisions such as guaranteed renewability for eligible individuals and a pre-existing condition exclusion provision.

To further regulate the business of insurance, the General Assembly amended the Kentucky insurance code, effective July 15, 1996, to include the chiropractic AWP statute. Ky. Rev. Stat. Ann. § 304.17A-171(2); *see also*

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[1] Although the Department disagrees with the Sixth Circuit's conclusion that Ky. Rev. Stat. Ann. § 304.17A-270 and Ky. Rev. Stat. Ann. § 304.17A-171(2) "relate to" ERISA plans, this Brief in Opposition will only address the arguments raised in the Petition for a Writ of Certiorari.

Petitioners' Appendix 89a-91a. In 1996 and 1998, some of the patient protection provisions in Ky. Rev. Stat. Ann. § 304.17A-110 were amended and codified in other parts of the insurance code.

Kentucky's current general AWP statute is found at Ky. Rev. Stat. Ann. § 304.17A-270. Petitioners' Appendix 89a. In drafting the AWP statutes, the Kentucky General Assembly's clear focus was to regulate insurance and to provide additional benefits to the consumers in Kentucky, many of whom were limited to one choice of insurer in their county or geographic area.

The language in Kentucky's general AWP statute is simple. It provides that a "health insurer" may not "discriminate against any provider who is located within the geographic coverage area of the health benefit plan and who is willing to meet the terms and conditions for participation established by the health insurer." Ky. Rev. Stat. Ann. § 304.17A-270. *See also* Petitioners' Appendix 89a. "Insurer" is defined in subtitle 17A[2] as "any insurance company; health maintenance organization; self-insurer or multiple employer welfare arrangement not exempt from state regulation by ERISA; provider-sponsored integrated health delivery network; self-insured employer-organized association, or nonprofit hospital, medical-surgical, dental, or health service corporation authorized to transact health insurance business in Kentucky." Ky. Rev. Stat. Ann. § 304.17A-005(23). *See also* Petitioners' Appendix 89a.

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[2] Subtitle 17A governs all "health benefit plans" issued in Kentucky.

"Health benefit plan" is also defined in subtitle 17A as "any hospital or medical expense policy . . . nonprofit hospital, medical-surgical, and health service corporation contract . . . provider sponsored integrated health delivery network; a self-insured plan or a plan provided by a multiple employer welfare arrangement, to the extent permitted by ERISA; health maintenance organization contract . . . " Ky. Rev. Stat. Ann. § 304.17A-005(18). *See also* Respondent's Appendix A.

The chiropractic AWP statute simply states that "[a] health benefit plan that includes chiropractic benefits shall . . . [p]ermit any licensed chiropractor who agrees to abide by the terms, conditions, reimbursement rates, and standards of quality of the health benefit plan to serve as a participating primary chiropractic provider to any person covered by the plan." Ky. Rev. Stat. Ann. § 304.17A-171(2); *see also* Petitioners' Appendix 89a-91a.

Petitioners, Kentucky Association of Health Plans, Inc., *et al.*, challenged the Kentucky Department of Insurance's enforcement of the AWP statutes in the United States District Court for the Eastern District of Kentucky.

Petitioners asked the District Court to find the AWP statutes unconstitutional and enjoin the Department from enforcing the statutes against any party. On cross-motions for partial summary judgment, the District Court held that the statutes are saved from ERISA preemption because they "regulate insurance." Petitioners filed an appeal with the Sixth Circuit Court of Appeals. Looking solely at the language in Kentucky's AWP statutes and applying this Court's two-part test found in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *see also*,

e.g., UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358 (1999) (same; quoting *Metropolitan Life*), the Sixth Circuit determined that Kentucky's statutes regulate insurance within the meaning of 29 U.S.C. § 1144(b)(2)(A).[3]

First, according to the mandate in *Metropolitan Life*, a court must inquire as to whether the statute regulates insurance as a matter of "common sense." Second, *Metropolitan Life* requires a court to apply the three criteria developed under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), to determine whether a practice constitutes the "business of insurance." The three criteria are as follows: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Metropolitan Life*, 471 U.S. at 743 (emphasis in original).

In requesting Certiorari, Petitioners are asking this Court to find that the general concept behind an AWP statute prevents it from being a statute that regulates the "business of insurance." However, to reach this conclusion would require the Court to treat all state AWP statutes the same. That is not the Sixth Circuit's holding in this case. The Sixth Circuit correctly applied the two-part test to the specific language in Kentucky's insurance code and properly found that Kentucky's AWP laws are saved

[3] *See Kentucky Ass'n of Health Plans, Inc. v. Nichols*, 227 F.3d 352 (6th Cir. 2000) found at Petitioners' Appendix 1a-63a.

from ERISA preemption. Therefore, Certiorari is not appropriate in this case.

REASONS FOR DENYING THE WRIT

Petitioners have failed to demonstrate any compelling reason to justify granting the Petition for a Writ of Certiorari.[4] This case does not satisfy any of the criteria for the United States Supreme Court to grant review. The Sixth Circuit's decision is not in direct conflict with any precedents set by this Court and is not in direct conflict with any other Circuit Court's holding on this matter.

I. The Federal Circuits Are Not In Conflict Over The Issues Presently Before This Court.

Petitioners contend that Certiorari is warranted to address two controversies in the federal circuits. First, Petitioners maintain that there is a direct split in the circuits over whether AWP laws are preempted by ERISA. Respondent disagrees. The federal circuits have analyzed distinguishable AWP statutes and, therefore, it cannot be said that the circuits are divided on this issue. Second, Petitioners argue that there is a disagreement in principle among the circuits over the question whether laws that

[4] Respondent also filed a Brief in Opposition in *Community Health Partners, Inc., et al. v. Miller*, No. 00-1295 on April 13, 2001 addressing the same issues as in the present case.

affect the "cost component" of insurance risk satisfy the risk-transfer or risk spreading prong developed under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). Again, Respondent disagrees. The cases relied upon by Petitioners, in support of this argument, are clearly distinguishable from the present case.

A. There is No Split In The Circuits Over The Question Of Whether AWP Statutes Are Laws Which Regulate Insurance.

i. *The Eighth Circuit*

Petitioners rely on *Prudential Ins. Co. of America v. National Park Med. Ctr., Inc.*, 154 F.3d 812 (8th Cir. 1998) to argue that the circuits are divided on the issue of AWP statutes preemption. However, reliance on this case is erroneous.

In *Prudential*, the Eighth Circuit examined the Arkansas Patient Protection Act[5] and determined that it did not meet the "common sense test" as a statute that regulated insurance. As the Sixth Circuit correctly pointed out, Arkansas' Act did not meet the common sense test "because, in part, its scope included 'employers and administrators of self-insured plans.' " Petitioners' Appendix 27a. Whereas, Kentucky's AWP statutes are "directed towards and limited to health care 'insurers' " and, therefore, statutes that regulate insurance. Petitioners' Appendix 27-28a.

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[5] Ark. Code Ann. § 23-99-204(a)(3).

Unlike Arkansas' statute, Kentucky's statutes are limited to entities that assume financial risk and, therefore, are specifically directed toward the insurance industry. *See Washington Physicians Serv. Ass'n v. Gregoire*, 147 F.3d 1039, 1045 (9th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999) (finding that a Washington law was "specifically directed" toward the insurance industry, "because it operates directly on HMOs and . . . entities . . . engaged in the business of health insurance.").

ii. *The Fifth Circuit*

Next, Petitioners rely on *Texas Pharmacy Ass'n v. Prudential Ins. Co. of America*, 105 F.3d 1035 (5th Cir. 1997), *cert. denied*, 522 U.S. 820 (1997) and *Cigna Healthplan of Louisiana, Inc. v. Louisiana*, 82 F.3d 642 (5th Cir. 1996) to argue that the circuits are divided on the issue of whether AWP statutes are preempted by ERISA. Petitioners' reliance on these cases is also misplaced.

In *Texas Pharmacy Ass'n*, the Fifth Circuit found a Texas statute relating to pharmacies preempted as it did not meet the third requirement in the McCarran-Ferguson test. Specifically, the Fifth Circuit found the Texas statute did "not fall within the savings clause because it is not limited to entities within the insurance industry." *Texas Pharmacy Ass'n*, 105 F.3d at 1038. The Texas statute applied to "health maintenance organizations (HMOs), preferred provider organizations (PPOs), and other organizations that provide health care services." *Id.* The Fifth Circuit went on to state that if a self-insured employer, not subject to the Any Willing Provider statute, "signed up with an HMO or PPO, those organizations would be

subject to the statute, even if there is no insurance company involved." *Id.* at 1039.

Texas Pharmacy Ass'n is factually and legally distinguishable from the present case. First, as Petitioners concede, the Fifth Circuit did not analyze all of the factors relevant to the determination as to whether a statute "regulates insurance" for the purposes of the ERISA savings clause. Instead, the court merely analyzed the third requirement under the McCarran-Ferguson test to find the statute preempted. Thus, the court was requiring compliance with all the McCarran-Ferguson factors before it would find the statute saved from ERISA preemption. However, as the Sixth Circuit correctly noted, "the three McCarran-Ferguson factors are not required to be satisfied before a state law can be found to be a law regulating insurance." Petitioners' Appendix 38a. Because the court in *Texas Pharmacy Ass'n* failed to apply the "common sense test" and analyze the statute under all three of the McCarran-Ferguson factors, the case is legally distinguishable from the present case.

Second, the court in *Texas Pharmacy Ass'n* found that the Texas statute applied to HMOs and PPOs acting as administrators of an employer's self-funded plan. *Texas Pharmacy*, 105 F.3d at 1039. Kentucky's statutes do not function in such a manner. The Sixth Circuit correctly noted that "Kentucky statute[s] [are] directed toward and appl[y] to only insurers and not to plan administrators." Petitioners' Appendix 29a. The Department of Insurance only regulates risk-bearing entities. "A plan administrator that does nothing more than administer the plan of a self-insured employer is not engaged in 'the underwriting and spreading of risk.' " Petitioners' Appendix 29a,

quoting *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

For these reasons, the Fifth Circuit's decision in *Texas Pharmacy Ass'n* is legally and factually distinguishable from the present case.

In *Cigna Healthplan of Louisiana*, the Fifth Circuit again analyzed a state statute by applying only the third factor of the McCarran-Ferguson test. In doing so, the Fifth Circuit concluded that Louisiana's statute is not limited to entities within the insurance industry and, therefore, preempted by ERISA. *Cigna Healthplan of Louisiana*, 82 F.3d at 650. The court found that "[e]ven though the statute lists insurers as one group covered by its terms, it also specifies, in a non-exclusive list, that it applies to 'self-funded organizations, Taft-Hartley trust, or employers who establish or participate in self-funded trusts or programs . . . ' " *Id.*

Again, the Fifth Circuit's decision in *Cigna Healthplan of Louisiana* is legally and factually distinguishable from the present case. First, the Fifth Circuit did not fully analyze the statute when it failed to apply the "common sense test" and the three McCarran-Ferguson factors to the statute. Instead, the court found preemption after analyzing only the third factor of the McCarran-Ferguson test. Second, Louisiana's statute is distinguishable from Kentucky's AWP statute in that it does not meet the "common sense" definition of insurance because it attempts to regulate entities clearly outside the insurance industry (*i.e.*, self-funded organizations and employers). Kentucky's AWP statute is not as far reaching. Therefore,

Petitioner's reliance on *Cigna Healthplan of Louisiana* is erroneous.

There is no conflict among the circuits. The circuits have reviewed different state statutes drafted by different state legislatures. Petitioners would have this Court believe that a state legislature could not pass AWP legislation without it being preempted by ERISA no matter what language was used. That simply is not the case. Kentucky has successfully drafted and passed AWP legislation that, as both the district court and court of appeals found, is saved from ERISA preemption.

B. The Circuits Are Not Divided Over The Substantive Content of the McCarran-Ferguson Risk-Spreading Factor

Petitioners rely on *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939 (9th Cir. 1998), *cert. denied*, 526 U.S. 1086 (1999); *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562 (11th Cir. 1994), and *Prudential Ins. Co. of America v. National Park Med. Ctr. Inc.*, 154 F.3d 812 (8th Cir. 1998) to argue that the circuits are divided over the substantive content of the McCarran-Ferguson risk-spreading factor. Petitioners' reliance on these cases is misplaced.

First, in *Cisneros*, the Ninth Circuit determined that California's notice-prejudice rule – a rule prohibiting a denial of benefits for late-filed claims absent prejudice to the insurer – did not have the effect of transferring or spreading the policyholder's risk. The court also found that the failure of the notice-prejudice rule to meet the first prong of the McCarran-Ferguson test did not affect the earlier determination that the rule met the common-

sense view of regulating insurance. *Cisneros*, 134 F.3d at 945-946.

California's notice-prejudice rule is distinguishable from Kentucky's AWP statutes. Unlike California's rule, Kentucky's AWP statutes allow for additional coverage for the insured by providing the insured with more choice in health care providers. This shifts more of the cost of covering the care to the insurer, which may have chosen to exclude a provider's service, but for the requirements of the Any Willing Provider statute. Thus, Kentucky's AWP statutes reduce the chances the insured will have to pay out-of-pocket to access a health care provider of choice. *See Blue Cross & Blue Shield v. Bell*, 798 F.2d 1331, 1335 (10th Cir. 1986) (discussing Kansas' "mandated-provider law," the court stated that "[t]he policy determines the scope of coverage, that is, whether [the insured] has assumed the risk of the entire loss . . . The choice of a provider does not add to the insured's coverage but is of the essence of that coverage bargained for as the transferred risk"). For these reasons, Petitioners' reliance on *Cisneros* is erroneous.

Smith v. Jefferson Pilot Life Ins. Co., 14 F.3d 562 (11th Cir. 1994), *cert. denied*, 513 U.S. 808 (1994) is also distinguishable from the present case. The Eleventh Circuit in *Jefferson Pilot* considered whether a Georgia law requiring an insurer to provide written notification of termination to the insured had the effect of transferring or spreading a policyholder's risk. The Eleventh Circuit concluded that it did not. Unlike the Georgia statute at issue in *Jefferson Pilot*, Kentucky's AWP statutes place an additional risk on the insurer at the time the insured contracts with the

insurer. Georgia's statute merely placed an additional administrative duty on the insurer.

A consumer contracts with a health insurer in order to have affordable access to providers. A diverse panel of providers reduces the chances the consumer will have to seek care outside the network and, thus, increases the insurer's risk but reduces the insured's risk. For these reasons, Petitioners' reliance on *Jefferson Pilot* is misplaced.

The court in *Prudential Insurance Co. of America v. National Park Medical Center, Inc.* (8th Cir. 1998) failed to analyze the first McCarran-Ferguson factor with regard to Arkansas' Patient Protection Act. The court only concluded, without analysis, that Arkansas' Patient Protection Act did not transfer or spread the policyholder's risk. Because the court failed to analyze the first prong of the McCarran-Ferguson test, the court's conclusion in *Prudential Insurance* cannot be relied upon to support Petitioners' argument.

The Ninth Circuit and Eleventh Circuit have both considered the application of the McCarran-Ferguson risk-spreading factor. However, these circuits have applied that factor to statutes that are distinguishable from Kentucky's AWP statutes. Because the circuits have reviewed distinguishable statutes, Petitioners' argument that the circuits are divided over the substantive content of the McCarran-Ferguson risk-spreading factor is simply incorrect.

Even if it can be argued that the circuits have developed differing views of the risk-spreading factor, a division over one factor of the McCarran-Ferguson test does

not warrant this Court granting Certiorari. As the Sixth Circuit stated, "it should be emphasized, in applying the McCarran-Ferguson factors, that 'the focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders,' and state statutes aimed at regulating that relationship, 'directly or indirectly, are laws regulating the business of insurance.' " Petitioners' Appendix 34a, citing *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 501 (1993).

Additionally, the Sixth Circuit correctly noted that "the three . . . factors are not required to be satisfied before a state law can be found to be a law regulating insurance." Petitioners' Appendix 38a. The three factors are merely "guideposts" and the ultimate test remains whether "from a common sense view, the Kentucky AWP laws in question regulate insurance." *Id.* Kentucky's AWP statutes easily meet the common-sense view of regulating insurance. Certiorari should not be granted to review one factor of the McCarran-Ferguson test.

II. The Sixth Circuit Properly Followed All Applicable Precedents Of This Court.

Petitioners argue that the Sixth Circuit's decision contradicts this Court's precedent in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Respondent disagrees.

Royal Drug is a 1979 antitrust case wherein this Court ruled that pharmacy provider agreements are not the "business of insurance" within the meaning of the McCarran-Ferguson Act and, therefore, are not exempt

from the antitrust laws. The pharmacy provider agreements at issue involved an insurance company's agreement with pharmacy providers to sell prescription drugs for $2.00 to the company's policyholders in exchange for reimbursement from the company for the cost of the drug. This Court held that these agreements were "merely arrangements for the purchase of goods and services" by the insurance company. *Royal Drug*, 440 U.S. at 214.

Kentucky's AWP statutes are distinguishable from the pharmacy agreements at issue in *Royal Drug*. Kentucky's AWP statutes address much more than "arrangements for the purchase of goods and services." The Kentucky General Assembly passed the AWP statutes as part of a major health insurance reform measure. The General Assembly intended to make healthcare coverage more affordable and accessible to citizens of the Commonwealth and enacted these statutes as patient protection provisions to benefit the consumer. The Kentucky General Assembly did not enact the statutes to benefit the insurance company or providers. Rather, Kentucky's AWP statutes benefit the consumer by shifting part of the cost of healthcare from the insured to the insurer. This is done by allowing consumers greater access to providers and lessening the chances that the consumer will have to pay out-of-pocket to visit a provider of choice. The Kentucky General Assembly accomplished this task with an awareness of ERISA preemption. With preemption in mind, the AWP laws were written so that it applied only to those entities engaged in the business of insurance.

The Fourth Circuit has determined that AWP statutes can indirectly affect "the insured's choice of provider and

the consequent cost to the insured if he or she deems an excluded provider to be better qualified for treatment of a specific illness or accident. In this way it affects the risk that an insured must bear." *Stuart Circle Hosp. Corp. v. Aetna Health Management*, 995 F.2d 500, 504 (4th Cir. 1993), *cert. denied*, 510 U.S. 1003 (1993); *see also Texas Pharmacy Ass'n v. Prudential Ins. Co. of America*, 105 F.3d 1035 (5th Cir. 1997), *cert. denied*, 522 U.S. 820 (1997) (distinguishing a prior AWP statue from *Royal Drug* and concluding that the statute affects spreading of risk because it influences which costs are borne by the insurer and which are borne by the policyholder). Since Kentucky's AWP statutes function in the same manner as the AWP statute in *Stuart Circle* and the prior AWP statute in *Texas Pharmacy Association*, they are much more than "arrangements for purchase of goods and services."

Although one can argue that the agreements in *Royal Drug* did not concern the policyholder, one cannot argue the same for Kentucky's AWP statutes. Access to qualified healthcare providers through insurers is of vital concern to consumers. The Department of Insurance, the entity charged with regulating health insurers in the Commonwealth of Kentucky, confronts this basic consumer issue as part of its daily regulatory function. Therefore, the Sixth Circuit correctly stated that "[u]nlike *Royal Drug*, policyholders in Kentucky will benefit under their policies by a new change in coverage, insofar as availability of providers is concerned." Petitioners' Appendix 32a-33a.

Royal Drug involved issues of antitrust law. As the court noted in *American Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc.*, 973 F. Supp 60, 72 (D. Mass. 1997), it

is not clear that the holding in *Royal Drug* can "be translated to the ERISA preemption context at all."

Petitioners have maintained at both the district court level and the circuit court level that *Royal Drug* should be the standard applied in this case. That argument has been rejected every time. Again, on Petition for a Writ of Certiorari, Petitioners have failed to present any new arguments with regard to the applicability of *Royal Drug*.

III. Petitioners' Attempt To Treat All State AWP Statutes The Same Must Fail.

Petitioners contend that Certiorari is warranted to resolve the issue of whether ERISA preempts AWP statutes. However, that is not the question before this Court. The Sixth Circuit, as did the Fourth, Fifth, and Eighth circuits, considered separate and distinct AWP statutes. Neither the Sixth Circuit, nor the other circuits, were asked to consider whether AWP statutes are "good for" the healthcare industry generally. Instead, each circuit was asked to analyze a particular state AWP statute and decide whether that AWP statute was preempted by ERISA. Each circuit decided this question by applying the test developed by this Court in *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724 (1985) and *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999).

There is no issue of national importance. Petitioners simply want to broaden the scope of ERISA preemption because they do not like the general concept of AWP statutes. Petitioners are attempting to broaden the scope of ERISA preemption when this Court has recently narrowed ERISA preemption with regards to state regulation

that was not contemplated to fall within a broad ERISA preemption umbrella. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *DeBuono v. N.Y.S.A. – ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997); and *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316 (1997).

Certiorari is not warranted because this Court has already set forth a clear ERISA preemption test to be applied to state statutes. The test does not need to be expanded. Regardless of Petitioners' "feelings" about AWP statutes, if a statute meets the two-part test, a court must find that the statute is not preempted. The Sixth Circuit correctly applied the test to Kentucky's AWP statute and correctly found that it is not preempted by ERISA.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Respondent's Appendix A

KRS 304.17A-005(18)

"Health benefit plan" means any hospital or medical expense policy or certificate; nonprofit hospital, medical-surgical, and health service corporation contract or certificate; provider sponsored integrated health delivery network; a self-insured plan or a plan provided by a multiple employer welfare arrangement, to the extent permitted by ERISA; health maintenance organization contract; or any health benefit plan that affects the rights of a Kentucky insured and bears a reasonable relation to Kentucky, whether delivered or issued for delivery in Kentucky, and does not include policies covering only accident, credit, dental, disability income, fixed indemnity medical expense reimbursement policy, long-term care, Medicare supplement, specified disease, vision care, coverage issued as a supplement to liability insurance, insurance arising out of a workers' compensation or similar law, automobile medical-payment insurance, insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability insurance policy or equivalent self-insurance, short-term coverage, student health insurance offered by a Kentucky-licensed insurer under written contract with a university or college whose students it proposes to insure, medical expense reimbursement policies specifically designed to fill gaps in primary coverage, coinsurance, or deductibles and provided under a separate policy, certificate, or contract, or coverage supplemental to the coverage provided under Chapter 55 of Title 10, United States Code;